In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1336

CLAIRE IRENE FISHER, ADMINISTRATRIX OF THE ESTATE OF VIRGIL FRANKLIN FISHER, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States Post Office let a "star route contract" [1] to Walter C. Thompson of Zanesville, Ohio for the transportation of mail between Zanesville and Coshocton, Ohio for a term beginning April 28, 1962, and ending June 30, 1963. On March 8, 1963, Albert A. Heskett, while employed by Thompson, had a collision with an automobile that resulted in the death of Virgil F. Fisher, a passenger in the automobile. At the time of the accident, the truck driven by Heskett

[1] A "star route contract" is "a contract for the transportation of mail over a post road other than a railroad and may include collection and delivery service to patrons of the postal service." 39 U.S.C. 6401.

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was hauling United States mail under the contract.[2] Petitioner brought this action under the Federal Tort Claims Act, 28 U.S.C. 1346(b), alleging that the death of her husband was caused by Heskett's negligence.[3]

The court of appeals affirmed *per curiam* the district court's entry of summary judgment in favor of the United States (356 F. 2d 706, Pet. App. 17–20). The court of appeals ruled that Thompson was an independent contractor of the United States and that therefore Heskett, Thompson's employee, was not an "employee of the Government." 28 U.S.C. 1346(b), 2671. Thus, the United States could not be liable for Heskett's negligence. The court rejected petitioner's contention that the United States could be held liable on the theory that it had a "non-delegable duty" to retain control over Thompson and Heskett, noting that the doctrine of non-delegable duty is applicable only where the defendant remains in charge of premises upon which hazardous activities are being performed by an independent contractor. Here, the court noted, there "was nothing unusually hazardous about letting a contract * * * for carrying mail in a truck over the highways of the state. Nor was the United States negligent in letting such a contract. Obviously the United States was not in control of the premises at the site of the accident" (Pet. App. 17–20).

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[2] Petitioner states that Heskett was driving a "mail truck" (Pet. 3). It was not, however, government owned, as this statement might imply.

[3] Contrary to petitioner's suggestion (Pet. 3), Heskett's negligence has not been conceded, but rather was expressly denied in an answer to plaintiff's interrogatories. The question of negligence, of course, was not reached by the district court.

The decision of the courts below is clearly correct, and further review is unwarranted. Petitioner concedes (Pet. 14) that under the Federal Tort Claims Act the United States is not liable for the negligence of independent contractors. 28 U.S.C. 2671, 1346(b). Applying the established rule that, if control of the manner and means of performing the work is left to the person actually doing it, he is an independent contractor, the court of appeals found that under the "star route" contract Thompson was an independent contractor, not an employee of the government. This was clearly so, since the manner and means of performing the contract were left up to Thompson and Thompson—not the United States—was under the contract to give "personal supervision" to any employees he used to carry out the contract. Every other court that has dealt with such contracts for carrying mail has reached the same conclusion.[4]

Petitioner's reliance upon the tort doctrine of "nondelegable duty" is misplaced. As the court below ruled, that doctrine is inapplicable unless the activity resulting in the injury is unusually hazardous and takes place on premises controlled by the person who employed the independent contractor. Accord: *Galbraith* v. *United States*, 296 F. 2d 631, 634 (C.A. 2); *Buchanan* v. *United States*, 305 F. 2d 738 (C.A. 8).

[4] See *National Labor Relations Board* v. *Carroll*, 120 F. 2d 457 (C.A. 1); *Thomas* v. *United States*, 204 F. Supp. 896 (D. Vt.); *Smick* v. *United States*, 181 F. Supp. 149, 151 (D. Nev.); *Thompson* v. *Daugherty*, 40 F. Supp. 279, 282 (D. Md.); *Magann* v. *Long's Baggage Transfer Co.*, 39 F. Supp. 742, 746–747 (W.D. Va.); *Fleming* v. *Gregory*, 36 F. Supp. 776 (E.D. La.).

Neither condition was met here. In any event, to apply such a doctrine here, thus imposing on the government liability for the negligence of its independent contractors, would contravene the express terms of the Federal Tort Claims Act. The Act provides for liability "only on a 'negligent or wrongful act or omission' of an employee" (*Dalehite* v. *United States*, 346 U.S. 15, 44–45), and it explicitly states that independent contractors are not employees of the government (28 U.S.C. 2671). Thus, the United States is not liable for the negligence of its independent contractors even though in some circumstances a private employer may be liable for the negligence of his independent contractors.[5] *E.g.*, *United States* v. *Page*, 350 F. 2d 28, 34 (C.A. 10), certiorari denied, 382 U.S. 979; *Dushon* v. *United States*, 243 F. 2d 451, 454 (C.A. 9); *Strangi* v. *United States*, 211 F. 2d 305 (C.A. 5); *United States* v. *Hull*, 195 F. 2d 64, 67 (C.A. 1).

Petitioner lastly contends (Pet. 15) that "the United States was not permitted by reason of the public policy considerations to delegate or divest it-

[5] As the court below recognized (Pet. App. 18–19), it has been uniformly held that the question of who is a federal employee for purposes of the Federal Tort Claims Act is governed by federal, not State, law. *Blackwell* v. *United States*, 321 F. 2d 96, 98 (C.A. 5); *Brucker* v. *United States*, 338 F. 2d 427, 428, n. 2 (C.A. 9), certiorari denied, 381 U.S. 937; *United States* v. *Hainline*, 315 F. 2d 153, 156 (C.A. 10), certiorari denied, 375 U.S. 895; *Pattno* v. *United States*, 311 F. 2d 604, 605 (C.A. 10), certiorari denied, 373 U.S. 911; *Courtney* v. *United States*, 230 F. 2d 112 (C.A. 2). Therefore, it cannot aid petitioner if the tort law of some States equates independent contractors with employees.

self of the control over this trucking operation by the use of a so-called independent contract." This contention overlooks the fact that Congress has expressly authorized the Post Office Department to enter into such "star route" contracts. 39 U.S.C. 6401, *et seq.*

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

JUNE 1966.

U.S. GOVERNMENT PRINTING OFFICE:1966